Louisiana Supreme Court gives ‘duty to defend’ new meaning for insurance lawyers

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For decades, Louisiana law maintained that—under standard language found in most commercial general liability policies—insurers who had a duty to defend their policyholders must defend the entire lawsuit, including in long-latency cases. In other words, your defense attorney was on the case—at the insurance company’s expense—even if some of the alleged actions took place outside the window of the active liability insurance policy.

But this bedrock notion of once-in, all-in has been shattered. The Louisiana Supreme Court, in a September 2016 ruling in Arceneaux v. Amstar Corp., turned years of well-established state law on its head, holding that “duty to defend” in long-latency disease cases should be prorated based on the number of years the insurance company was providing coverage. The ruling is almost certain to have a significant impact on the cost of doing business in the state.

The case traces its roots to a lawsuit filed by some 100 former employees of American Sugar who sued for occupational hearing loss due to their long-term exposure to industrial noise—over a period between 1941 and 2006—while working in the company’s Arabi refinery. Yet the larger question became: How much responsibility did American Sugar’s liability insurer have to fund the company’s defense?

Legal upheaval

American Sugar, in a subsequent lawsuit, argued Continental Casualty Co.—the general liability insurer of parent company Amstar—should provide a defense against the entire lawsuit, even if some claims fell outside the period during which Continental provided coverage. Not an outrageous request given that not only had this been the long-established practice in Louisiana but also, adds Kean Miller attorney Michael deBarros, “the language of a general liability policy that an insurer has to defend a suit, not a portion of a

suit."

Yet Continental, which issued eight general liability policies to American Sugar between 1963 and 1978, countered its duty to defend—including legal fees—applied only to the last of those policies, covering a 26-month window and including coverage for bodily injury. Each of Continental's previous policies excluded coverage for bodily injury that occurred to employees during the course and scope of their employment. Further, Continental argued American Sugar should bear legal defense costs for any periods during which the company had no liability coverage.

"The court essentially converted the duty to defend into a duty to partially reimburse defense costs." —Todd Rossi, attorney, Kean Miller

"With commercial general liability, an insurer has two basic responsibilities," says Dan Wade, staff attorney with United Policyholders, an organization that educates and advocates for insurance policyholders. "They have a duty to defend you as a policyholder) if a suit is brought against you, and they have a duty to indemnify," or pay damages.

"The rule in Louisiana has always been that, regardless of a long-term exposure situation, the duty to defend would be triggered by any policy that existed, so long as at least one claim made against the insured was potentially covered by the policy," says Todd Rossi, Kean Miller's general counsel in Baton Rouge. "The duty to defend covers the entire suit."

Think of it this way, says Kean Miller attorney Mark Mese: "The common trigger is not when you get sick, but how long you were exposed. It's generally been that way for 50 or 60 years."

In general, an insurer's duty to defend a policyholder is broader than its duty to indemnify because the duty to defend is determined by the allegations contained within the lawsuit as well as the language in the policy. "This is known as the 'Eight Corners Rule' analysis," says Steve Whalen, an attorney with Breazeale, Sachse & Wilson in Baton Rouge.

While the obligation to cover defense costs for an entire suit can be costly for insurers, it gives them more control over the case. The insurance company selects the defense counsel and has a significant voice in litigation tactics. Claiming only partial defense liability, the company risks forfeiting those

controls. “Ultimately,” says Mese, “they have more skin in the game as to the outcome of the litigation with the duty to defend.”

In the Arceneaux case, however, the Louisiana Supreme Court ruled that, like the duty to indemnify, the duty to defend was also limited to the period of the policy, thus finding that insurers had to pay only a pro rata share of both defense and indemnity costs.

“The court essentially converted the duty to defend into a duty to partially reimburse defense costs,” Rossi says.

The decision has created a legal upheaval. “All these insurance companies will be trying to decide how they’re going to pay for their percent and the insured is still in the middle of defending the suit,” says Mese. “There are too many cooks in the kitchen. It’s going to get messy.”

Impact on businesses

The Arceneaux ruling has significant implications for Louisiana businesses, which could—depending on the terms and coverage dates of liability policies—shoulder a far greater financial burden defending lawsuits and paying claims. Small businesses, in particular, are most likely to feel the harshest impact.

“Attorney fees can add up quickly, so the defense costs may be larger than damages,” says Beth Milito, senior executive counsel for the National Federation of Independent Business. “That’s why duty to defend is so important for all businesses—they know their insurance company is going to provide an attorney and cover all the defense costs.”

The bottom line, says Wade, is that “liability insurance is essentially litigation insurance. Most companies can’t afford to pay defense costs on their own.”

Moreover, if a business has periods of non-coverage—or periods for which it can’t prove coverage—the business will be responsible for its pro rata share of defense costs.

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“One thing this case makes abundantly clear is you need to keep your insurance policy in a safe place and keep it forever,” says Milito. “Proving you were insured may come down to being able to pull up that policy and prove that you were insured 20 to 30 years ago.”

Locating past policies—particularly paper-based policies issued before such records were kept electronically—can be difficult, especially for companies in south Louisiana, where hurricanes, flooding, fires and other disasters may have destroyed files over the years.

“Now is a good time if you are a Louisiana business to sit down with your insurance broker and make sure you have adequate coverage,” Milito says. “Your insurance agent can be a very important ally for your business. Ask probing questions, such as, ‘What defense will be provided to me?’ and ‘Do I need to get umbrella coverage for any gaps in my coverage?’”

Going forward

Given the Arceneaux case applies only to Louisiana, Whalen says businesses should determine where their policies were purchased and whether the policy mandates which state’s laws will apply. Unknown is how the court’s decision will be applied to other commercial liability cases in the state.

“The court interpreted this case on a very narrow basis, on this specific policy,” says Mese. “It had very unique language on what is bodily injury and the court latched onto that specific language.”

Other insurers, predicts Rossi, will try to expand the reasoning and holding of the Arceneaux case to other policies. “Insurers may try to extend this to a policy that has very different language and gloss over that this case had specific facts and specific language related to the unique nature of long-latency occupational disease,” he says. “For other cases with different facts and different language in their policies, the Arceneaux ruling might not apply.”

Ultimately, the duty to defend issue is likely to come before the Louisiana Supreme Court again.

“We’ve got multiple courts of appeal in Louisiana, so the Louisiana Supreme Court may wait until they have different opinions and different nuances,” says Mese. “But, we’ll end up back in front of the

Supreme Court when the stakes are high enough and the facts are right. Our job is to remind the court that 50 years of law has not been changed, only slightly modified."

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